(12)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

NO. 231

GENERAL EXPORTING COMPANY, an Illinois corporation,
Petitioner (Appellant below),

vs.

STAR TRANSFER LINE, a Michigan corporation, and SOUTHARD & CO., LTD., an English corporation,
Respondents (Appellees below).

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

At the outset, we wish to invite the attention of the Court to the fact that Southard & Co., being the respondent to whom the trial court awarded the 799 cases of Scotch whiskey has filed no brief herein, and is not seeking to defend or justify the decree of the trial court (affirmed by the Supreme Court of Michigan) in its favor.

Star Transfer Line, who instituted the interpleader action, is the only respondent before this court seeking to defend and justify the decree and opinion hereby sought to be reviewed and reversed. Star asserts that it "has no other interest in said whiskey than as an innocent stakeholder, save for its lien for warehousing", a lien which is statutory and which cannot be avoided. That statement is hardly supported by its actions.

There is a running comment throughout the brief of Star that petitioner never paid for the whiskey (brief, pp. 2, 4, 9, 10). Passing the impropriety of such comments in a brief opposing the issuance of the writ of certiorari herein sought, it is to be pointed out that Southard in no action ever asserted a claim for the purchase price of the whiskey, but rather it claimed ownership thereof. If Southard had asserted that petitioner was indebted to it for the purchase price of the 799 cases of whiskey, as disclosed by the two invoices (Rec. 544, 545), less such legitimate deductions and credits as petitioner might have thereto, we would accede thereto. We pause to observe that such should have been the position taken by Southard in the first instance, and had it been so, we would not now be before this Court.

Because of the many innuendoes in the brief of Star as to the non-payment of the purchase price of the whiskey, and the unwarranted and baseless assertion, reiterated in different form, that petitioner is endeavoring to obtain the whiskey by fraud, by the misconstruction of statutes, by the improper interpretation of treasury regulations, and by other improper means, we believe that it is not amiss (albeit perhaps not properly included in this reply brief) to here point out (as is fully disclosed by the documentary evidence in the record) that the whiskey was delivered by

Southard to the ocean carrier for transportation to the United States and that the bill of lading for each shipment, being two in number, was delivered to petitioner; that thereafter Southard prepared and delivered invoices for the two shipments (Rec. 544, 545) and on the reverse side of each invoice, duly executed by Southard, is a consular certificate and acknowledgment disclosing a sale, and designating petitioner as the purchaser. A sale is further evidenced by the invoice dated February 12, 1940 (Rec. 551), in which petitioner is not only charged with the purchase price of the whiskey but also for the freight, consular fees, insurance and all other items of expense incident to the shipment. It is further to be observed that the invoice specifically provides for the time of payment. These latter observations apply also to the second shipment.

There is not one syllable on any of the documents prepared and delivered by Southard which indicates any intention to retain title to the whiskey; but the documents definitely and conclusively disclose that there was an intention to effect a sale of the whiskey.

The customs rules and regulations of the Treasury Department provide that where an outright sale is not made the owner of the merchandise must execute a form of declaration different than that executed in the instant case by Southard, as is disclosed by Art. 274 of the Customs Regulations of the United States. For the convenience of your Honors we quote subsection (6):

> "If the merchandise is shipped otherwise than in pursuance of a purchase or an agreement to purchase, the value of each item, in the currency in which the transactions are usually made, or, in the absence of such value, the price in such currency that the manufacturer, seller, shipper or owner would have received,

> or was willing to receive, for such mechandise if sold in the ordinary course of trade and in the usual wholesale quantities in the country of exportation."

It is plain that Southard did not comply with the quoted section of the Customs Regulations for the simple season that there was an outright sale, and, therefore, no necessity for compliance therewith.

It is likewise plain, we respectfully assert, that Southard, aided by Star, perceiving the greatly enhanced value of the whiskey subsequent to the sale deemed it expedient to claim title to the whiskey, and, if successful, thereby obtain a sum equal to four or five times the agreed sales price of the whiskey.

It is stated by Star (brief, p. 3, second full paragraph) that a clear summary of the relationship of the parties is given in the opinion of the trial court (Rec. 478). We do not acquiesce in the statement so made and the summary made by the trial court. However, it is our judgment that argument thereon should not be incorporated in this reply brief, and so we defer making any further discussion on that subject.

Respondent Star asserts that we have raised only three issues. We disagree with that statement. We refer to our original petition which recites the jurisdictional statement.

Paragraph numbered 1 of the jurisdictional statement of Star (brief, p. 4) respondent does not accurately state our position. We prefer our own statement of our position.

In paragraph numbered 2, respondent urges that one of

our jurisdictional grounds is that the exporter (improperly stated as importer) having no basic permit warrants its purported agent (petitioner) in appropriating the whiskey without paying for it. Petitioner was not the agent of Southard (the exporter), and could not legally be such agent. Star is not properly concerned with whether the petitioner paid for the whiskey or not. The question of payment is not an issue; but such question is injected into the case for the apparent purpose of confusing the issues and attempting to discredit petitioner on the grounds that it seeks to appropriate property without paying therefor.

Under paragraph numbered 3, Star recites a perverted version of our theory. We do not say, and we do not urge, that title to the whiskey can be "shifted from owner to consignee by a Federal statute." It would conserve the time of this Court to again read our jurisdictional statement rather than to now enter into an extended discussion of the erroneous and improper defense urged by Star.

We shall hereinafter caption the subdivisions of this reply brief in the same sequence as they appear in the brief of Star.

I.

Under this caption of Star's brief it is asserted that no notice was given to counsel for Star of the filing of the petition for the writ herein sought together with a copy of the petition, printed record and supporting brief, as is required by the rules of this Court. The complete answer to that erroneous statement is to be found in the records of the clerk of this Court where there will be found a receipt for the petition, printed record and supporting brief signed by Warner, Norcross & Judd, on July 11th, 1944,

on the form furnished by the clerk of this Court. Like service was had on, and like acknowledgment made by, Cummings and Wyman, attorneys of record for Southard & Co., on July 8th, 1944, as is also disclosed by the record thereof in the office of the clerk of this Court.

II.

Under this caption Star asserts that petitioner is not the real party in interest and therefor cannot properly prosecute this action. Star argues that John J. McKeown is not such a *bona fide* purchaser for value of the negotiable warehouse receipt issued by Star as to permit him to sue out an application for a writ of certiorari; that petitioner is not a proper party because, as Star asserts, as between McKeown and petitioner, the assignment is conclusive. In other words, so Star asserts, neither the petitioner nor McKeown can prosecute an application for a writ. By that process of reasoning, only the respondents would be privileged to sue out an application for a writ of certiorari and neither McKeown nor the petitioner would be extended a like privilege. To merely recite the position of Star is to disclose the fallacy of the position taken.

Rule 17(a) of the Federal Rules of Civil Procedure provides *inter alia* that every action shall be prosecuted in the name of the real party in interest; but a party with whom or in whose name a contract has been made for the benefit of another may sue.

We respectfully assert that petitioner falls squarely within this provision of the rule. Petitioner, as the record disclosed, was under a contractual obligation to McKeown to sell the whiskey in question and remit the proceeds to him. That obligation was imposed at the time when the

negotiable warehouse receipt issued by Star to petitioner was assigned to McKeown. Petitioner is the only party to this litigation who can lawfully pay the customs and revenue duties and charges on the whiskey and withdraw the same from bonded storage.

The strained construction for the rule advanced by Star has never been sanctioned by any court so far as we can ascertain. Each of the cases cited by Star are readily distinguishable from the case at bar. None of such authorities presented a situation substantially similar with the case at bar nor analogous to it. We desire to state to the Court that we have diligently read each of such authorities and it is our judgment, and we so represent to your Honors, that such authorities in no wise raise any legal barrier to the institution, prosecution and allowance of this application for a writ of certiorari.

As has been aptly said, "The real party is the one who is to be benefited or injured by the judgment in the case". Plainly that party in the case at bar is General Exporting Co., the petitioner herein. Obviously it would avail McKeown nothing to be adjudged the sole owner of the whiskey if he could not lawfully sell it. To avoid just that contingency McKeown obtained from General an agreement that General would sell the whiskey and turn the proceeds over to him.

Stated in another fashion, McKeown was the beneficiary of General. If McKeown had alone brought suit he would have been confronted with the argument that since he could not lawfully pay the duty on the whiskey, withdraw it from bonded storage, and lawfully sell it, he could not properly maintain any action to be adjudged the sole owner. That would be an empty victory.

That General is a proper party to institute, prosecute and obtain the allowance of the writ of certiorari herein sought is supported by *Rosenblum* v. *Dingfelder,* 111 F. (2d) 406, and *Beach* v. *Beach,* 114 F. (2d) 479, and particularly the language on page 482. See also *Price & Pierce* v. *Jarka Great Lakes Corp.,* 37 F. Supp. 939.

III.

Under this subdivision of their brief counsel for Star apparently seek to reply to the first portion of our argument (IV, p. 13). Counsel for Star assert that a State court may determine title to the whiskey and not affect the rights of the Federal government thereto. Conceding *arguendo* that that statement might be correct as applied to other forms of litigation, its application to the case at bar is prevented by the specific provision of the Federal statute (28 U. S. C. A. 747; Revised Federal Statutes, Sec. 934) which restricts jurisdiction exclusively to courts of the United States. The distinctive jurisdiction of State and Federal courts has been recognized for more than a century. Perhaps it is best expressed, as it is said, in classic terms in what Mr. Chief Justice Taft called "the great judgment" of Chief Justice Taney in *Ableman* v. *Booth,* 21 How. 506, 516:

> "* * * the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye."

Counsel for Star apparently rely quite strongly upon *United States* v. *Klein*, 303 U. S. 276, in support of their position that a State court does have jurisdiction to determine conflicting claims of ownership made by private parties to whiskey held by a Collector of Customs for the payment of duty thereon.

This authority obviously involves a rule of law entirely foreign to the case at bar in that there was a State escheat law which specifically provided that whenever an escheat has occurred of any money or property deposited in the custody of or under the control of any court of the United States in and for any district of Pennsylvania, a court of common pleas of the county in which said court of the United States sits shall have jurisdiction to ascertain if an escheat has occurred and to enter a judgment or decree of escheat in favor of the Commonwealth. (The applicable section of the statute is recited in a footnote to the opinion on page 278.) We respectfully point out that in the opinion this court said (p. 280):

> "The Government does not, in pleading or argument, set up any right, title or interest in the present fund adverse to the unknown bondholders. It does not contend that the fund has been or can be escheated to the United States. It agrees with the contention of appellee, which we accept as correctly interpreting the applicable federal statutes, *that the fund remains subject to the order of the district court to be paid to the persons lawfully entitled to it upon proof of their ownership.* But it insists here, as in the state courts, that the decree declaring the escheat is an unconstitutional interference with a court of the United States, an invasion of its sovereignty, and is an attempt, void under the Fourteenth Amendment, to exercise jurisdiction over the absent bondholders and the moneys, neither of which are shown to be within the state" (Italics ours).

In its opinion this court further stated that the decree for the escheat of the fund was not founded on possession and does not disturb or purport to affect the Treasury's possession of the fund or the district court's authority over it; and that at most the decree of the State court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office; and that it was subordinate to every right asserted and decreed in the federal suit and effective only so far as it establishes rights derived from them. This court concluded its opinion with the following statement (p. 282):

> "Since the Government has not set up and does not assert any claim or interest in the fund apart from the possession acquired under the decree of the district court and the statutes of the United States, it is unnecessary to consider now the effect on the decree of the state court of the fund's absence from the state, and the absence or nonresidence of the unknown claimants, if such is the case. All such questions will be open and may be raised and decided whenever application is made to the district court for payment over of the fund."

It is thus to be observed that if at any time in the future any of the so-called unknown bondholders should appear they would make application to the Federal court for payment of the bonds owned by them. The Commonwealth of Pennsylvania was not claiming ownership of the funds in question. This authority does not purport to determine the question here presented, and has no analogy to a situation where it is expressly provided by statute that the *res* shall be subject only to the orders and decrees of the courts of the United States.

We therefore respectfully assert that this authority cannot and does not support the wholly unwarranted position

taken by Star. The action was purely a statutory one as this court very carefully pointed out.

The other two authorities (*Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, and*Equitable Trust Co.* v. *Pollitz*, 207 Fed. 74) have no application to the case at bar as will be readily disclosed by cursory reading of each case. In the first case, this court expressly held that where jurisdiction is once taken by a Federal court that proceedings thereafter commenced in a State court will not supersede the decree of the Federal court and its jurisdiction ended by the subsequent proceedings of the State court.

In the latter case, there was an appeal from an order of the district court denying the motion for a preliminary injunction to restrain defendant from taking certain proceedings in an action pending in the Supreme Court of New York. There was a *per curiam* opinion in which the court held that the State court having refused to interfere with the litigation in the Federal court that no reason existed for enjoining the proceedings in the State court, but when the State court changes its attitude it will be time enough to go into the interesting questions of law presented upon the briefs and see whether upon the merits, an injunction should be granted.

Counsel for Star next argue a proposition of law which, assuming its correctness, has no application to the case at bar, nor do any of the three authorities cited in the proposition of law advanced in any wise appertain to the questions presented by this petition for a writ of certiorari. Counsel for Star has not seen fit to argue the proposition of law advanced by them. We respectfully assert that had any endeavor been made to have applied such proposition

of law to the case at bar the fallacy of such proposition would readily have been apparent.

Counsel for Star next argue the proposition of law that a State court may properly adjudicate rights in property in the possession of a Federal court, and render any judgment not in conflict with that court's authority to decide questions within its jurisdiction, and conversely a Federal court may litigate with respect to property in the custody of a State court, which, again assuming the correctness of the statement, has no application to the case at bar, nor do any of the authorities cited in support of such proposition preclude the allowance and issuance of the writ here sought. Counsel for Star has not seen fit to apply such authorities to the case at bar, and thereby point out how and in what manner such authorities are a barrier to the allowance and issuance of the writ of certiorari here sought. Counsel for Star has failed to observe that the rights of the petitioner are fixed by a Federal statute which specifically designates the forum in which a determination shall be had: a Federal court.

Counsel for Star next urge that the statute which we rely on was not intended to cover the instant situation, but was only intended to prevent replevin of property seized by customs authorities, and in support of that theory a number of authorities are cited without discussion. A reading of each of these authorities will readily disclose that no one of them supports the theory advanced by Star. It is pertinent to point out that the Federal statute in question provides that property taken or detained shall be irrepleviable, *and* shall be deemed to be in the custody of the law, *and* subject only to the orders and decrees of the courts of the United States. It is thus apparent that the statute

(stated in the conjunctive) has three provisos, and not one as counsel for Star contend.

It is asserted that *Peabody* v. *Maguire*, 79 Me. 572 (12 Atl. 630), supports the position taken by Star that a State court has jurisdiction to make a decree affecting the ownership of property in a bonded warehouse where the State court did not attempt to interfere with the possession or custody of customs authority. We respectfully assert that our construction of *Peabody* v. *Maguire* is the construction given that case in *Galveston, H. & S. A. Ry. Co.* v. *Terrazas*, 171 S. W. 303, cited by petitioner in its brief (p. 16). We respectfully assert that *Peabody* v. *Maguire* does not support the position taken by the appellees.

In *State* v. *Intoxicating Liquors*, 109 Atl. 257 (Maine) the Supreme Court of Maine draws the same conclusion from *Peabody* v. *Maguire* as we do. An excerpt from the opinion discloses beyond argument that we are correct in our conclusion (p. 259):

> "While, therefore, these goods remained in the bonded warehouse in Chicago, they were in the actual custody and exclusive possession of the government, which possession could not be surrendered, except on exportation, or under a decree of the United States court (Customs Reg. Sec. 731), until all duties and charges were paid (*U. S.* v. *DeVisser*, (D. C.) 10 Fed. 642; *Pattison* v. *Dale*, 196 Fed. 5, 115 C. C. A. 639; *Hartranft* v. *Oliver*, 125 U. S. 525, 528, 8, S. Ct. 958, 31 L. Ed. 813; *Guesnard* v. *L. & N. R. R.*, 76 (Ala. 457). This rule was recognized by this court in *Peabody* v. *Maguire*, 79 Me. 584, 12 Atl. 630, where it was held that there could be no actual attachment by a state officer of goods held in bond, although, of course, the consignee, as having the general property, in the goods, subject to the lien, could be held as trustee under our garnishee or trustee process."

In *Raftes* v. *Argyropulo*, 206 N. Y. S. 284, plaintiff made a levy on tobacco in the possession of the Federal Government to await the payment of duties under a so-called warrant of attachment, and a motion was made to vacate the same. The court pointed out that during the period the tobacco was in the custody of the Government to await payment of duties or reshipment without payment of duties it was not subject to any attachment or State process. The court held that the possession of the goods by the warehouse company was that of the Government and that, in so far as a levy had been attempted to be made against the warehouse company as third party holding goods in which the defendant had an interest, it was void as in violation of the Federal statute and that it constituted an attempt to levy upon goods that Congress said should be immune.

The court vacated the writ of attachment but permitted the writ to remain in effect in so far as it affected an accounting by the trust company to intangible property held by it for the defendant.

It is next argued by counsel for Star that the authorities cited by petitioner "save those to the effect that property in bond is still within the custody of the customs (which are irrelevant to the issue) have been distinguished by the Circuit Court of Appeals in *General Exporting Co.* v. *Star Transfer Line*," (136 F. (2d) 329). With that statement we most strongly disagree.

We respectfully assert that the Circuit Court of Appeals fell in error its disposition of that appeal. We deem it important to point out that the Circuit Court of Appeals held (in the second paragraph of its opinion) that Southard sold to petitioner the Scotch whiskey in question. That

court further held that Southard not having a basic permit, could not lawfully have the whiskey upon its arrival in the United States warehouse in its own name for its protection against default for the payment of the purchase price.

By the decree and opinion here sought to be reviewed, it was determined that Southard was the sole owner of the whiskey, contrary to the express conclusion and determination of the Circuit Court of Appeals.

Counsel for Star here says that both courts are right. Southard is not here to assert that anomalous position. We respectfully urge that it is plain that both courts cannot have reached the correct conclusion as to this phase of the litigation. Upon this question of ownership, we believe, and urge, that the Circuit Court of Appeals is correct.

We desire to point out that the Circuit Court of Appeals did not pass upon the questions here presented. The appeal was from an order of the trial court dismissing the action there sought to be maintained upon the ground that there was pending in a State court another action presenting the same issues, and also the lack of authority in the Federal court to enjoin the further prosecution of the proceedings in the State court.

In the concluding paragraph at the top of page 331 of the opinion it is recited that the decree entered by the Superior Court of Grand Rapids "directed that in due course, *consistent* (italics supplied) with Federal statutes, the appellee warehouseman should be empowered to sell the whiskey, subject to customs duties and internal revenue taxes owing on it". We respectfully assert that the dominant flaw in this statement is that the whiskey could not be sold by the warehouseman because the Collector of Cus-

toms would not accept payment of the custom duties and internal revenue from the warehouseman (Star) or from Southard; and, moreover, neither could lawfully make such payment.

It is pertinent to observe, we respectfully assert, that in its opinion the Circuit Court of Appeals adverted to the answer filed in that proceeding by the Collector of Customs (first full paragraph, p. 332) in which he stated that unless the aggregate duties and internal revenue on the whiskey be paid before specified dates, he would be authorized by law to offer the whiskey at public sale, and further averred that "any disposition or order of a court other than that of the United States would be disregarded by your defendant in the performance of his peculiar duties in the premises". It is thus apparent that the decree and opinion here sought to be reviewed are wholly without force and effect, and that our position is fully supported by the particular official who is to be affected by the decree and opinion.

Coming now to paragraph numbered 1 of the opinion (p. 332: It is stated that although *Harris* v. *Dennie*, 3 Peters 180, 28 U. S. 292, supports the position of the appellant (General), nevertheless, "It should be easily observed, however, that this ancient authority furnishes no true guidance toward disentanglement of the involved issues in the case at bar". We respectfully observe that this "ancient authority" has never been disavowed by this Court, nor has it ever been criticized, nor has it in any wise been restricted by any subsequent decision of this court. On the contrary, the essence of this authority became embodied in a Federal statute shortly after its rendition, and has since remained an enforcible statute with but minor changes. We desire to

point out that your Honors were not reluctant to follow *Taylor* v. *Carryl*, 20 How. 597, when it rendered its decision in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 135, referred to in paragraph numbered 3 of the opinion. We can perceive no reason why so ancient an authority as *Taylor* v. *Carryl, supra,* might be relied upon by this Court in support of its opinion in the *Toucey* case, but *Harris* v. *Dennie, supra,* because of its so-called ancient lineage does not furnish a true guide in the case at bar. We respectfully assert that the Circuit Court of Appeals should have followed *Harris* v. *Dennie,* and had it done so we believe, and respectfully assert, that a different conclusion would have been reached.

We wish to point out to your Honors that the substance of the opinion in *Harris* v. *Dennie* was enacted into a Federal statute shortly after the rendition of that opinion, and from thence hitherto, with but a few minor changes not important here, that statute has remained in full force and effect. Prior to the enactment of the existing law upon this question Revised Statutes, Sec. 934; Sec. 747, Title 28, Chap. 8, U. S. C. A.)there was precedent in the Act of January 9, 1809, Secs. 11 and 13, Vol. 4, pages 194-195, control of imported merchandise in bond. The second section of that bill extended the jurisdiction of Circuit Courts in revenue cases, and it provided and declared that property taken under authority of any law of the United States should be irrepleviable and subject only to orders and decrees of courts of the United States. It provided a penalty for any violation or attempted violation of any dispossession without authority of a United States court. The object of this section was to meet regulation by regulation. The debates upon the bill (Congressional Debates, Gales & Seatons Register, page 260, 22nd Congress, 2nd Session) showed that there was nothing either shocking or harsh in this

provision. Three years after the opinion in *Harris* v. *Dennie, supra,* (22nd Congress, 2nd Session, Chap. 57, March 2, 1833) in a section dealing with the jurisdiction of Circuit Courts it was provided:

> "All property taken or detained by any officer or other person under authority of any revenue law of the United States shall be deemed to be in the custody of the law and subject only to the laws and decrees of the courts of the United States, having jurisdiction thereof, and if any person shall dispossess or rescue or attempt to dispossess or rescue any property so taken or detained as aforesaid or shall aid or assist therein such person shall be deemed guilty of a misdemeanor and shall be liable for punishment as provided in the twenty-sixth section of the Act."

This Act was the subject of congressional consideration in 1866 by the 39th Congress, 1st Session, Chap. 184, and the provisions of the Act of 1833 were not materially altered. This Act was amended and modified by the passage of Revised Statute 934, and there was deleted from it the provision making its violation a misdemeanor and punishable by a fine.

This Act remains the present law, and has been construed in various decisions of the courts of the United States.

Further consideration of the Act was given in the enactment of what is now the custom regulations and the Customs Administrative Act of 1930, and is designated as Article 940, which is identical with Revised Statutes Sec. 934. In 1928 it was the subject of Treasury Decision 19340, in which the Treasury Department construed the Customs Administrative Act of June 10, 1890, and there said:

> "You will perceive, therefore, that merchandise in bonded warehouse, or in customs custody, is not subject

to the orders, judgment or decrees of any state court, * * *."

From the foregoing recitation of legislative history your Honors will perceive that *Harris* v. *Dennie, supra,* states the law of the land, and that by reason thereof your Honors should grant the writ of certiorari herein sought.

In the opinion of the Circuit Court of Appeals it was stated that *Peabody* v. *Maguire,* 79 Me. 572, 12 Atl. 630, *supra,* was quite pertinent. That opinion was rendered in 1887, and, we respectfully observe, is quite an ancient authority. It is to be noted that the court in that authority said (p. 584) that "the property in dispute, although in bond for storage, was constructively, in their possession" (referring to the trustees). In the case at bar we have absolute, sole and exclusive possession of the whiskey in the Collector of Customs for the Port of Detroit. A reading of that authority does not disclose that any of the parties to that litigation raised the question of jurisdiction. In the Synopsis of Decisions of the Treasury Department referring to this decision said, "It is nevertheless apparent, that the case is readily distinguishable from a proceeding to render such property directly, subject and amenable to a State Process."

We respectfully assert that the Circuit Court of Appeals in applying *Covell* v. *Heyman,* 111 U. S. 117, to the case before it failed to take into consideration the very vital distinction which we believe we have brought out. We respectfully assert that there is no legal distinction between property held by a United States marshall under a writ of execution, and property held by a Collector of Customs for the payment of custom duties and internal revenue taxes. It is stated in the opinion that this authority "recognized

that all other remedies to which a party may be entitled" not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the court' may be pursued 'in any tribunal, State or Federal, having jurisdiction over the parties and the subject matter' ". This is the very nub of our argument that the Sperior Court of Grand Rapids did not have and could not have jurisdiction of the subject matter of the interpleader action. For how was that court to obtain jurisdiction of the subject matter while the Collector of Customs had the sole and exclusive custody and control of the whiskey. The very essence of an interpleader action is that there be delivered into the custody of the court in which the action is pending, either physically or symbollically, the sole and exclusive custody and control of the subject matter of the action. Plaintiff in the interpleader action was wholly without power or ability to do either.

We believe that we have sufficiently pointed out in what manner the Circuit Court of Appeals fell into error, and why that decision is no barrier to the issuance by this honorable Court of its writ of certiorari.

Counsel for Star next urge that *Galveston, H. & S. A. Ry. Co.* v. *Terrazas,* 171 S. W. 303 (Texas) is not in point upon the ground that the action in that case concerned an attempt to have the State court physically affect the possession and custody of the bonded goods. The attempted distinction is verbal and not real. Counsel for Star has failed to point out why the decree of the Superior Court of Grand Rapids, and the opinion of the Supreme Court of Michigan affirming it, do not likewise affect the possession and custody of the Collector of Customs over the 799 cases of whiskey.

IV.

Counsel for Star next urge that petitioner has attempted to construe certain statutes and treasury regulations out of their proper sphere in the hope of acquiring title to the whisky without payment therefor. The statement that petitioner hopes to acquire title to the whisky without payment therefor is as false as it is baseless. We reiterate that we have never disputed our liability to pay for the whisky. Counsel for Star have not pointed out in their argument how the construction that we contend for is misconceived or erroneous. We respectfully urge that our construction of the applicable statutes and regulations is the only proper construction permissible, and such construction is fully supported by the authorities cited and discussed in our brief.

We concede that it is not one ofthe purposes of statutory requirements under the Federal Alcohol Administration Act (27 U. S. C. A., Chap. 9) to enable importer-agents to defraud principals. For that grossly improper and wholly unwarranted statement counsel for Star cited three authorities. None has any application to the case at bar. Other than this improper and unwarranted statement there is no attempt made to reply to our argument that Southard lacking a basic permit could not in any event lawfully own the whisky. The cry of fraud hardly serves as an adequate reply to our proposition of law. We respectfully urge that no reply was made because no proper and legitimate reply could be made that would avoid the plain terms of the statute and treasury regulations.

Perhaps the complete authoritative answer to the argument of Star under this caption is to be found in Treasury Decision 45614, from which we have quoted on page 18 of our brief.

Counsel for Star have not seen fit to point out how and why that decision is not determinative of the issue of ownership. We respectfully urge that lack of argument results from an entire inability to avoid the effect of that decision.

It is next urged that the purpose of Sec. 1483 of U. S. C. A., Title 19, is to avoid the necessity of investigation as title in the collection of custom duties and to prevent fraud. No such construction of the statute is to be found in any decision with which we are familiar, and we believe that no such decision exists. Certainly none of the authorities cited by Star support such construction.

It would serve no useful purpose for counsel to again argue the construction and applicability of *Giles* v. *Newton*, 21 F. (2d) 484, since your Honors will be compelled to read that authority to determine whether our construction of that decision is correct or whether the construction urged by counsel for Star is correct. We believe that we have reached the proper construction of the decision, and that it supports our viewpoint and position.

It is urged by counsel for Star that *Conklin* v. *Newton*, 34 F. (2nd) 12, supports their position that the statute in question is purely one for administrative conveniences and does not change any rights between the parties themselves. Passing for the moment, the question that the record conclusively shows that a sale of the whiskey in question was effected by Southard to petitioner, as disclosed by the two invoices and consular acknowledgment on the reverse side of each (Rec. 544 and 545), we wish to point out that this authority was an action against Newton, personally, who was at the time Collector of the Port of New York, for conversion. The opinion does incude the excerpt

quoted by Star, but that excerpt must be read in connection with the entire opinion. In the second paragraph immediately preceding the quotation the court said:

> "Section 2789 of the Revised Statutes provided that, whenever an entry is imperfect for want of invoices or for other causes the collector shall take the merchandise into his custody, and section 2652 provides that it shall be the duty of all officers of customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws.
>
> The bond which was given in the present case was not given for the purpose of securing duties which had to be paid before delivery, and for which there was a possessory lien on the goods, but to secure the collector against loss from delivery of the imported merchandise to a person against whom the collector was not afforded any statutory protection, because that person had not complied with section 2785 of the Revised Statutes by producing the bill of lading."

Then follows the quoted paragraph. It will thus be seen that the opinion does not support the proposition of law for which it is cited by Star.

Conclusion.

It is respectfully submitted that petition has disclosed such a case as, under the authorities cited, and the applicable Federal statutes and customs rules and regulations, warrants the allowance and issuance by this honorable Court of its writ of certiorari as prayed for in the petition heretofore filed herein.

Respectfully submitted,

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